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COST RECOVERY ACTIONS

UNDER THE

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA)

COST RECOVERY ACTIONS UNDER CERCLA

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

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MEMORANDUM

SUBJECT: Guidance on Pursuing Cost Recovery Actions Under CERCLA

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TO: Enforcement Counsel
Regional Administrators
Regional Counsels
Associate Enforcement Counsel-Waste Division
Regional Superfund Coordinators
Air and Hazardous Substance Division Directors,
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I. INTRODUCTION

Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides generally that past and present owners and operators of a site, and generators and transporters who contributed hazardous substances to a site, shall be liable (with certain limitations to be discussed herein) for all costs of removal or remedial action undertaken by the U.S. government, a State, or any other person, and for damages to or loss of natural resources.

While it is highly desirable to obtain removal and remedial action in the first instance by responsible parties, rather than by the Environmental Protection Agency (EPA) or a State, there are and will continue to be many cases in which the Agency will authorize the use of CERCLA funds from the Hazardous Substance

Response Trust Fund (the Fund) established by CERCLA for these actions, and thereafter attempt to recover those costs from the party or parties who are liable under Section 107 of the Act and other authorities.

Due to the possibility of cost recovery efforts in any case in which CERCLA funds are expended, the observation, documentation and preservation of critical facts and response costs is important to assure that:

- potential evidence concerning the site 1/ and responsible parties is noted and documented before response activity or the passage of time obscures or eliminates it;
- physical evidence essential at trial is collected and preserved appropriately; and
- sufficient evidence of total costs and claims paid from the Fund has been maintained and is available to support recovery by the government.

This memorandum describes essential elements which the government will probably be called upon to prove in a cost recovery action; the assembly and maintenance of a file; some examples of appropriate documentation for each element of the cause of action; procedures for processing and negotiating cost recovery claims; and the mechanics of repayment of any recovery to the Fund. This guidance must be observed by EPA employees, contractors, and, where appropriate, employees of State agencies working on a site on which CERCLA funds are expended under an

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1/ The word "site" as used herein applies to any location where a release or spill has occurred, and maybe used interchangeably with "facility" as defined in CERCLA §101(9).

EPA-State cooperative agreement, in every situation in which CERCLA funds are expended for site clean up, since each of these sites is the subject of a potential cost recovery action. The Office of Waste Programs Enforcement is preparing an additional cost documentation guidance; please contact Libby Scopino (382-4482) for assistance.

II. ASSEMBLING A COST RECOVERY ACTION

The assembly of evidence for a cost recovery action begins with the first response action taken under Section 104 of CERCLA. The filing of a cost recovery action should be presumed; accordingly the collection of relevant documentation is important. Generally, the government will pursue a cost recovery action when there is a solvent responsible party.2/ Where other government action against the responsible party is contemplated or pending, such as a judicial action under Section 7003 of RCRA or Section 106 of CERCLA to compel remedial measures at a site, a cost recovery count under Section 107 of CERCLA for removal or remedial costs can be added to the ongoing litigation.

The Regional Program office has the responsibility of collecting and maintaining the documents used as evidence in cost recovery actions. In matters which require legal opinions (such as the legal right of the Agency to enter a facility) or the preparation of legal documents, the program office should consult with and obtain the assistance of the Regional attorney or the appropriate Headquarters attorney.

2/ For a discussion of the factors to be considered in determining whether to file a cost recovery action, see Part IV.F.

III. ELEMENTS OF A COST RECOVERY ACTION

Under Section 104 of CERCLA, the U.S. or its authorized representative may take removal or remedial action at a site when, inter alia, any hazardous substance is released or there is a substantial threat of such a release into the environment, unless EPA determines that such action will be done properly by the owner or operator or by any other responsible party. The government may pursue an action under §107(a) for (1) costs of removal or remedial action incurred by the U.S. not inconsistent with the National Contingency Plan (NCP), or (2) claims paid by the Fund for costs of response incurred by a state not inconsistent with the NCP, or by other parties not inconsistent with the NCP.3/ Section 104(b) also authorizes the recovery of costs of sampling, analysis, monitoring and surveying programs, and certain other costs, including those

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3/ There may also be a claim made by trustees under Section 107(a)(4)(c) of CERCLA for damage to or loss of natural resources. However, until regulations for assessment of natural resource damages or destruction are promulgated pursuant to Section 301(c) of the Act, claims for such damages will be assessed on a case-by-case basis. The best records available on those damages should be maintained until specific guidance is developed on that subject.

for planning, legal and engineering services.4/

Therefore, to successfully pursue a cost recovery action, EPA should be prepared to introduce evidence demonstrating:

1. release of a hazardous substance or the substantial threat of such a release; and

2. the responsibility of the defendant(s); and

3(a). removal or remedial actions taken by the U.S. or the State which were not inconsistent with the NCP 5/; and/or

4. the costs of action taken by the U.S., a State, or any other person.

The financial condition of a responsible party is not an essential element of proof of the cause of action.6/ Even so, the financial condition of the responsible parties may be considered in determining the feasibility of a cost recovery action.

4/ For a list of costs which are recoverable under CERCLA, see Appendix A.

5/ Although Agency policy is to maintain evidence that its response activities are not inconsistent with the NCP, the Agency takes the position that the defendant has the burden of proof on this issue.

6/ While we do not believe that it is necessary to introduce evidence that removal and remedial action would not have been done properly by the owner or operator of a facility or by any other responsible party, it would be prudent to have available evidence of efforts by the Agency to obtain private party response action at the site. The notice letters forwarded by the Agency to potentially responsible parties and their responses are examples of such evidence.

The chief elements of a cost recovery action and the nature of evidence required to sustain them are discussed below.

A. Evidence of Release or Substantial Threat of Release of a Hazardous Substance

A release of a hazardous substance or the substantial threat of such release from a facility must be shown. The term "hazardous substance" includes inter alia, any material designated as hazardous or toxic under the Clean Water Act, Toxic Substance Control Act, or the Clean Air Act or designated as a hazardous waste under RCRA (see 40 CFR 302). The definition should be consulted since it does not include every pollutant or contaminant.7/

Appropriate documentation of evidence of a release or substantial threat of release includes field notes, photographs of the scene, statements from witnesses, statements from owners or operators, follow-up narrative reports or memoranda describing the scene or observations first hand, samples of air, soil, water or leachate discharge and laboratory analyses of the samples. Evidence

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7/ Section 104(a) of the Act authorizes the President (or his designee) to take response action whenever there is a release or threat thereof of a hazardous substance, or whenever there is a release or substantial threat of a release of "any pollutant or contaminant which may present an imminent and substantial endangerment to the public health or welfare...". However, Section 107 refers only to liability of owners, operators, transporters and generators for costs incurred in responding to releases or threats of releases of "hazardous substances". It is not clear whether those persons may also be liable under §107 for costs incurred in responding to releases or threats of releases of any pollutant or contaminant which is not a defined hazardous substance, but which may present an imminent and substantial endangerment. The government intends to hold such persons liable for those costs under both section 107 of CERCLA and the common law theory of restitution.

collected must be sufficient to demonstrate this aspect of the case.

There are three important considerations here.

First, samples, records of the owner/operator, or other evidence sufficient to establish the identity of hazardous substances involved should be collected.

Procedures similar or identical to those used by the National Enforcement Investigations Center (NEIC) 8/ should be followed, as should the requirements of Section 104(e)(1)(B), which provides for furnishing a receipt to the owner/operator for any samples taken (and a split sample, if requested). Observance of chain-of-custody procedures is necessary to demonstrate at trial that samples analyzed as hazardous substances did, in fact, originate at the site.

Collecting more data and documentation about sites than is reasonably necessary may increase total response costs to an unduly high level and delay clean-up activities and cost recovery. The number of samples collected is primarily a matter within the judgment of the Regional and Headquarters Superfund Offices, and will necessarily depend to a great extent on the site and the affected areas of the environment. These Offices should consult with the Regional Counsel prior to collecting samples. However, the Agency should generally collect only enough samples to determine (1) that a hazardous substance is present on the site; (2) that a

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8/ NEIC Policies and Procedures Manual, May, 1978 (rev., Dec. 1981), EPA Document No. 330-9-78-001-R.

release of the hazardous substance is substantially threatened or has occurred: and (3) what response is appropriate. Only unusual circumstances (e.g., to satisfy doubts over validity of previous samples, to determine whether concentrations of hazardous substances are increasing, etc.) would justify incurring significant additional costs for any additional sampling and analysis.

Samples should be taken in accordance with EPA-approved protocols and procedures developed by NEIC and contained in its Policies and Procedures Manual referred to above or similar procedures.

Second, collection of this evidence should begin immediately upon the start of any investigation into whether some response activity (including sampling and surveying) may be needed at the site in response to a release or threat of release. Passage of time or deliberate interference by other parties may literally destroy the evidence. Similarly, a long delay between the initial observation and the trial, or the initial observation and the recordation of that observation, will make testimony by witnesses about the site more difficult. Photographs of the scene before, during and after the response action are frequently helpful in preparing witnesses to testify, and in providing a visual record to the Court of conditions that prompted the response activity.

Field notebooks and the results of laboratory analysis are critical in showing the conditions that existed at the site and establishing a potential link to the defendant. Sampling and analysis should be conducted with particular concern for accuracy,

detail, completeness and quality, since these documents are likely to be subject to close scrutiny by responsible parties and the court. The NEIC has developed inspection and analysis procedures to assure high quality evidence and documentation for trial. Observance of NEIC procedures assures a consistently high quality of evidence, and should be followed by EPA employees, other federal agencies, contractors, and State agencies which have entered into an EPA cooperative agreement for response using CERCLA funds.

Third, for ease of assembling the case and presenting it for trial, the following people should be identified by name, relevant qualifications or connection to the case, and information about how to contact them in the future: 1) persons who participated in the site inspection, sampling, analysis or photography; 2) persons who may have historic or current information from personal observation, 3) people who gave or refused to give statements.

B. Evidence of Responsibility of Defendant(s)

In most cases, the liability of defendants will be demonstrated by establishing the elements in subsections (1)-(4) of §107(a). EPA personnel have a variety of techniques to gather evidence connecting the hazardous substance with the potentially responsible party or parties. For example, a deed or lease evidences the responsibility of owner or operator of the site. Less formal evidence can also be helpful in tracing responsiblity. The operator's presence at the site over a period of time will usually be noted by employees, neighbors, law enforcement officers, competitors or others close to or interested in such activities. Those observations should be recorded in signed statements or affidavits. In addition,

the activities of operators of a site may require a license or permit under State or local laws and regulations. The appropriate agencies should be consulted to determine whether they have any record of activities by an operator of the site.

The problem of linking a transporter or generator of a hazardous substance to a site is frequently a more difficult undertaking. The following detection sources may prove fruitful. Often, operators, generators, and transporters have records of business transactions. Drums located on-site may bear labels or markings with the name of a generator; these drums or labels should be preserved, if possible, or photographed, and the photographs labeled for identification and future use as possible evidence. Under certain circumstances the case development team may decide to perform a chemical analysis of the waste to assist in establishing the similarity between the wastes and a particular company's process.9/ (Information regarding parties and sites may also be obtained by use of letters issued under authority of RCRA Section 3007 and CERCLA Section 104(e)).

Again, local residents, law enforcement officials or competitors may be sources of information on transporters of material to the site or in the general vicinity. Employees or former employees of a generator or transporter may be willing to discuss the disposal practices of their employers, and if so, signed statements or affidavits, if possible, should be obtained from them.

9/ Information on the composition of waste streams associated with various industrial processes may be obtained from the Hazardous and Industrial Waste Division (WH-565), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

C. Evidence That Removal or Remedial Action Taken By the U.S. or State Is Not Inconsistent With The National Contingency Plan

Pursuant to Section 104 of CERCLA, after information is gathered that a release has occurred or is threatened, a variety of actions may be taken by EPA or a State. Among those actions are:

(i) Investigations, monitoring, surveys, testing and other information gathering as may be necessary and appropriate to identify the existence and extent of the release or threat thereof, the amount, source and nature of the hazardous substances, and the extent of danger to public health, welfare or the environment. In addition, such planning, legal, fiscal, economic, engineering, architectural and other studies or investigations may be undertaken as necessary and appropriate to plan and direct response action;

(ii) "Removal actions", as the term is defined in Section 101(23) of CERCLA, and which includes, without limitation, security fencing, provision of alternative temporary water supplies, and temporary evacuation and housing of threatened individuals. In addition, EPA may take such other action as may be necessary to prevent, minimize or mitigate damage to public health, welfare or the environment, such as removal of materials, temporary diking and other easily accomplished actions; and

(iii) "Remedial actions", as the term is defined in Section 101(24) of CERCLA, including installation of a clay cover, dredging or excavations, collection of leachate and runoff, on-site storage, treatment or incineration, provision of alternative water supply and clean-up of released hazardous substances. Subject to some restrictions, it may also include permanent relocation of residents and business and community facilities, and off-site transportation,

storage, treatment or disposal of hazardous substances.

In a cost recovery action, two factors are important in the development and preservation of evidence regarding the appropriateness of the action taken by EPA or the state. These factors are:

A. The action was not outside what CERCLA allows.

B. The action taken must be "not inconsistent" with the NCP. Therefore, the NCP should be referred to and all persons involved in the decision-making process should be familiar with its requirements and limitations before decisions regarding actions are made 10/. Those decisions should be documented by notes, memoranda, letters and other written records maintained in the appropriate files.

Under the NCP, remedial actions must also be shown to provide a cost-effective response. A cost-effective remedy is one which, among the alternatives examined, is least costly but technologically feasible, reliable and adequately protects public health and the environment. In addition, under the Section 104 (c)(4) balancing test, the Agency should document remedial actions to refute any claims that the remedy was not cost-effective. Measures of cost-effectiveness includes the protection afforded public health, welfare and the environment by the remedy. In "immediate removal" actions it will be especially important to document the circumstances which justify the need for immediate action. As provided in section 300.65 of the National Contingency Plan, an immediate removal is appropriate when the lead Agency determines that the initiation of immediate removal action will prevent or mitigate immediate risk of harm to human life or health.

10/ The National Contingency Plan is published in 40 CFR Part 300, 47 Fed. Reg. 31180 (July 16, 1982).

Immediate removals are appropriate in such situations as: 1) human, animal, or food chain exposure to acutely toxic substances; 2) contamination of a drinking water supply; 3) fire and/or explosion; or 4) similarly acute situations.

Evidence of the cost-effectiveness of a particular remedial action may be demonstrated by the following evidence which is contained in summary form in the record of decision:

- studies showing the technical feasibility and probable cost of alternative remedial actions on the particular site;
- information that shows the degree of risk to public health, welfare and environment presented by the particular site (i.e., population threatened, media affected, toxicity of the hazardous substance involved, etc.);
- other documentation generated in consideration of the various factors required by Section 300.68 of the NCP.

All such evidence should be documented by written studies, reports, letters, memoranda, notes, minutes of meetings and any other record of the relevant bases for taking a particular remedial action.

D. Proof of Costs of Removal or Remedial Action by the U.S. or a State

Collecting evidence of costs of removal or remedial action taken on a site is likely to be a time consuming task. Documents must be obtained from a variety of participants in the cleanup activity: agencies, contractors, and others. The success of

government cost recovery actions depends upon the use of good bookkeeping and record collection techniques.

Certain costs expended on removal and remedial action are not recoverable. For example, no recovery under CERCLA is permitted where response costs resulted from application of a FIFRA-registered product (see Section 107(i)), or from a Federally-permitted release (see Section 107(j)). In borderline cases, it should be assumed that removal and remedial action costs are recoverable and records developed and maintained with this expectation.

A variety of mechanisms are available for tracking costs. While EPA prefers the uniformity of a single accounting system, the particular method of accounting may vary if it ensures accurate record keeping and preservation of all costs attributable to a particular site. To further this objective, cooperative agreements between EPA and a State, or contracts between EPA and a contractor for performance of response activity on a site, should specifically require that accounting procedures used by the State or contractor be approved by EPA.

An accounting and expense-tracking system is already in place at EPA, and should be followed closely by all EPA personnel, contractors and State agency personnel working on CERCLA-funded sites. This system generally involves the assignment of a unique accounting number to each specific site, and the charging of time, material and other expenditures to that account number. The site number is assigned by Headquarters based on a request from the Regional Office and confirmation of an approved Federal response.

In addition, activity codes have been devised under which different activities and phases of site clean-up and remedial action may be described. Questions regarding the specifics of these accounting procedures should be directed to the Financial Management Center in the Office of Emergency and Remedial Response (FTS 382-2208).

Evidence of the cleanup costs should be preserved and available for introduction into evidence. This could include such documentation as receipts for money paid for goods or services; cancelled checks; contracts and any amendments thereof; purchase orders; invoices; records of time spent, where the claim includes the value of such time; travel records and vouchers; and records of all correspondence or other communication regarding the actual costs, as well as progress reports on the work performed. The names, addresses and telephone numbers of all persons maintaining the regular business records of contractors, agencies or persons outside EPA should also be maintained for ready reference. 11/

11/ The Emergency Response Division of the Office of Solid Waste and Emergency Response of EPA is developing a field manual entitled "Cost Control Management for Superfund Removal" for immediate and planned removal actions. This manual presents a management system for On-Scene Coordinators for controlling, verifying, and documenting all costs incurred in a removal action.

IV. PROCEDURAL ISSUES

A. Timing of the Cost Recovery Proceeding

While the Office of Waste Programs Enforcement will work with the Regional Program Office in setting priorities for cost recovery, the following basic timing guidelines are offered. Cost recovery actions for expenses incurred in immediate or planned removals will normally not be initiated until after such response activity has been completed, since the time required for those activities is relatively short. However, a cost recovery action need not be delayed where the Agency establishes a multiphase response action (e.g., surface clean up, groundwater clean up). A cost recovery action can begin before completion of the last phase of response activity for costs expended to date and also for calculable future costs.

Where one stage of cleanup follows another in fairly rapid succession, cost recovery actions should be initiated after the cleanup is fully completed. In situations where there are substantial delays between phases, however, the Agency may decide to commence a recovery action at an intermediate stage. In these instances, negotiations regarding recovery of expenditures may be combined with discussions with responsibile parties over prospective cleanup activities. Generally, an action will not be filed for recovery of a remedial investigation/feasibility study or the cost of design prior to the filing of an action for recovery of construction costs.

B. Statute of Limitations

CERCLA does not contain a time limitation provision within which a cost recovery action must be brought. In the absence of a specific statutory provision, the Federal statute of limitation would apply. There is some doubt at this time as to precisely which limitation period will be applied to a cost recovery action. Limitations for actions brought by the United States for money damages are contained in 28 USC Section 2415, which distinguishes between actions based in tort or in contract. Because cost recovery actions are essentially quasi-contractual actions in the nature of restitution, a six year statute of limitations if any, should apply. However, since it is possible that a court may see CERCLA actions arising out of the tortious conduct of others, cost recovery actions should be brought within three years after the right of action accrues.

The date the cause of action accrues is also subject to debate. In United States v. The Barge Shamrock et al, 635 F.2d 1108, 1110 (4th Cir., 1980), cert. den. 102 S.Ct. 125 (1981), the Fourth Circuit held that a cost recovery action under the Federal Water Pollution Control Act arising out of an oil spill first accrued when the government completed the cleanup operation. On the other hand, a defendant might well be expected to argue that the cause of action accrues at the time funds are first expended on the site. In order to avoid argument on this point,

and to eliminate a potential bar to recovery, the Agency should attempt to commence all cost recovery action within three years of the date dollars are first expended.

C. Extent of Liability of Responsible Parties

While CERCLA Section 107(a) identifies parties who are responsible for the costs of response actions at a site, the statute does not expressly set forth the the nature of that liability. Language which imposed "strict, joint and several" liability on the responsible parties was dropped from earlier drafts in the final, compromise bill, and replaced with a definition in Section 101 of "liable" or "liability" which refers to the standard of liability which obtains under Section 311 of the Federal Water Pollution Control Act. Section 311 is a strict liability statute. City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140. n.4 (E.D. Pa. 1982). Moreover, section 311 imposes joint and several liability, U.S. v. M/V Big Sam, 681 F.2d 432,439 (5th Cir.), on pet. for reh., 693 F.2d 451 (5th Cir. 1982).

The position of EPA is that in appropriate circumstances, joint and several liability is applicable under CERCLA. This position is supported by reference to section 311, by the legislative history of CERCLA 12/, and by Section 107(e)(2) of CERCLA, which provides that nothing in CERCLA "shall bar a cause of action that an owner or operator or any other person subject to liability under this section... has or would have by reason of subrogation or otherwise against any person."

12/ 126 Cong. Rec., S.19964 (daily ed. Nov. 24, 1980); 126 Cong. Rec., H.11707 (daily ed. Dec. 3, 1980).

The Department of Justice has interpreted this section as confirming a defendant's right of contribution against other responsible parties, which is only of value to a defendant who has been held jointly and severally liable 13/.

Joint and several liability is traditionally imposed when the actions of two or more defendants cause a single, indivisible result, (Prosser, Law of Torts, (4th ed. 1971), Sec. 52.) That determination may involve factual issues. Therefore, where two or more parties in the categories of responsible parties listed in Section 107(a) contribute hazardous substances to a facility which are being released, threaten to be released, or are contributing to the release or threat, the Agency may argue that those parties are jointly and severally liable for the costs of responding to that release or threat.

This of course does not foreclose the Agency from entering into consent decrees or other appropriate agreements with multiple responsible parties in which they agree to allocate the Agency's response costs among themselves. The Agency is primarily concerned with achieving cleanup of hazardous sites, preferably by private action, and there are many reasons why responsible parties may wish to share the costs. However, this is primarily a matter for the responsible parties, and if they cannot agree among themselves on an appropriate allocation of responsibility, EPA should proceed with legal action on a theory of joint and several liability.

13/ Letter dated December 1, 1980, from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, to Hon. James J. Florio, 126 Cong. Rec. H11788 (daily ed. Dec. 3, 1980).

D. The Demand Letter

The first formal step in the commencement of a cost recovery proceeding will be the issuance of a letter of demand from EPA to the potentially responsible party or parties for payment of costs expended on the site. A demand letter should be sent to all parties in a case who have been identified as potentially responsible (i.e., past and present owners/operators of a site and generators and transporters who contributed hazardous substances to a site), and should be issued after all response activity has been completed, or at the completion of one phase of a multi-phase response where the entire process will require an extended period of time.

Before a demand letter is sent, the potential case should be analyzed for the elements in part III above, including identification of all potentially responsible parties (including responsible individuals in corporations where appropriate) and assembly of cost information. At the time the demand letter is sent, the Agency should be able to answer reasonable questions posed by a recipient of the letter. Regional personnel should have referred the case to Headquarters (or recommended against an action) and Headquarters staff should have resolved their position on a referral so that the Government is prepared to file a complaint if the response to the demand letter is unsatisfactory.

The letter should be issued where response costs have been incurred under CERCLA, regardless of whether a decision has been

made to initiate a judicial proceeding for cost recovery. The demand letter should contain the following points:

- reference to EPA's authority to administer CERCLA and the Fund established thereunder (or reference to authority to recover costs where the response activities for which reimbursement is sought occurred prior to CERCLA);
- the location of the site;
- the presence of a hazardous substance which was released or threatened to be released;
- in general terms, the dates and types of response activity undertaken by EPA at the site;
- any notice given to the recipient prior to or during the response activity, allowing the recipient the opportunity to undertake the work or pay the expense of response;
- the total cost of the response activity 14/ broken down into general categories;

14/ The amount stated in the demand letter should be the total obligated by the Agency to be expended on the site, rather than the amount shown by Agency records to have been expended on the site at the time the letter is prepared. This is to avoid problems caused by delays in payment of response costs after a demand letter has been forwarded to the responsible party. Even so, available records should be assembled as soon as possible. Where it is expected that future costs will be paid (e.g., in the next phase of response activity), the letter should also clearly state that in addition to the sums already obligated and spent, the Agency expects to expend additional sums on the site for which claim will be made against the responsible party. Of course, in a judicial proceeding in the cost recovery action, the Agency will be required to prove the actual amounts spent from the Fund.

- a general statement that the Agency believes that the recipient is a responsible party and liable for the sum set forth;
- a demand for payment;
- a statement that the recipient of the letter should contact EPA within a specified period (normally thirty days) to discuss the account and the recipient's liability therefor;
- a warning that if recipient fails to contact the Agency within the specified time, a suit may be filed in the appropriate U.S. District Court for recovery of the claim; and
- the name, address and telephone number of a representative of the Agency who the recipient should contact. A sample demand letter is attached to this memorandum as Appendix B.

The primary responsibility for preparation of the demand letter will be in the Regional Program Office. The Regional Program Office should consult with the representatives from OWPE, Regional Counsel, and Office of Enforcement Counsel-Waste. The demand letter will be sent through the Office of Waste Programs Enforcement for the signature of the Director of OWPE unless that requirement is specifically waived. If a case is referred to DOJ, the DOJ case attorney should sign the demand letter.

E. Procedure In Event of Response From Potential Defendant

In many cases, the recipients of demand letters will contact the Agency and express interest in discussing their status as a responsible party. The Agency encourages such negotiations.

CERCLA money is limited; Agency cleanup activities deplete the fund and money must be recovered from the parties responsible for the release or threat of release. Therefore cost recovery through negotiation or litigation is necessary to clean up the greatest number of sites. Cost recovery should involve the coordinated efforts of knowledgeable legal and technical personnel at both the Regional and Headquarters offices as explained below.

1. Negotiating Teams and Procedures

Upon receipt of a response to the demand letter from a potentially responsible party, the contact person named in the demand letter will notify the Associate Enforcement Counsel for Waste, the Regional Counsel, the Director of OWPE and the Regional Superfund office. Each of those offices will, upon notification, identify the person who will represent it on the negotiating team. (The Department of Justice may participate in cases which are likely to result in consent decrees or litigation.)

The formulation of the Agency's position results from the collaboration of the Team. In some policy decisions the entire Team has relevant background to participate in the decision making process. However the specialized legal or technical talent on the Team should be efficiently used.

The Team has the responsibility for developing a proposed negotiating schedule. The proposed schedule should have the concurrence of the Associate Enforcement Counsel for Waste and the Director, OWPE in cases of national significance.

Some factors which should be considered in the development of this schedule are the number of potentially responsible parties who will take part in the negotiations; the nature of the potential defenses; the amount of available data linking particular parties to the site; the amount of the claim, and other related matters. Sufficient time should be allowed for the negotiation process to take place, but it is important that a deadline be established as a goal for achieving a settlement, and beyond which the negotiations will not continue, absent clear indications that a settlement is imminent. A reasonable period of time for most negotiations is 60-90 days; negotiations should not be extended without Headquarters approval. A referral should be submitted by the Region and approved by Headquarters, and a complaint should be prepared and approved by the Department of Justice, prior to the conclusion of negotiations so that an action may be filed if negotiations are not resolved by the deadline.

a. Case Team Leader. Contemporaneous with the formation of the Negotiating Team, Regional and Headquarters program managers, in consultation with OLEC, will select a program official to serve as the Case Team Leader. The Case Team Leader's function will be to:

- focus efforts to develop, in advance of negotiations, the Agency's negotiating strategy and position on issues that may arise during the course of the case;
- ensure the coordination of legal and technical staff participation on the team by scheduling and chairing regular case review sessions; and
- define the Agency's objectives in accordance with applicable Agency guidances and policies.

On occasion, the Team may be unable to develop a consensus on a cost recovery issue. When this occurs, the Case Team Leader will prepare a written explanation of the issue for resolution by the appropriate supervisory staff.

b. Lead Negotiator. Regional Counsel and Headquarters Enforcement Counsel managers, in consultation with the Director of OWPE, will select the lead Agency attorney for the case.

Although a Regional Counsel attorney will usually be designated as the lead Agency attorney, in cases of national significance or which may be precedent-setting an attorney from OEC-Waste may be selected. The extent of Headquarters involvement will be decided on a case-by-case basis by the Assistant Administrator for Enforcement, (or the Special Counsel for Enforcement until the Assistant Administrator position is established). The Department of Justice should also be consulted and invited to participate in negotiations of cases which are likely to result in a consent decree or litigation particularly in multiparty and complex cases.

The Team's lead attorney will be responsible for conducting cost recovery negotiations. Although the attorney is primarily responsible for explaining and defending the Team's position during negotiations, he or she may request other Team members' assistance in articulating the Team's position to opposing parties.

At the initial negotiation session, the lead attorney should inform opposing parties that while the Team has authority to negotiate, any agreements are subject to the approval of Enforcement Counsel and OSWER. The opposing parties should also be advised that the Agency has established a deadline for settlement. The deadline should be disclosed to the responsible parties. After the deadline, the Agency will take judicial action.

2. Form of Settlement Agreement

CERCLA allows the Agency several ways the Agency could settle a cost recovery action:

- a consent decree
- an administrative order
- a memorandum of agreement.

However, as a matter of policy, the Agency has decided that a consent decree is required in most cases. A forthcoming policy will set out the requirements for using consent decrees and another one will address administrative orders.

Again, it should be pointed out that the negotiating Team is not authorized to enter into a binding agreement of any type with the responsible parties in the absence of specific authorization from the Enforcement Counsel and OSWER. Consent decrees must also be approved by the Department of Justice and the reviewing court (after a thirty day public comment period). A draft of any document which is to be the subject of negotiation should, of course, be reviewed before commencement of negotiations by appropriate supervisors of the negotiating Team at the Region and Headquarters, and any document which the negotiating Team and their supervisors believe to be acceptable for settlement should be forwarded to the Assistant Administrator for Enforcement, the Director of OWPE and the Department of Justice at the earliest possible time to allow for adequate review.

The Agency may allow some settlements in which the responsible party agrees to pay the claim in periodic payments where the party is unable to pay in a lump sum, or where there is other legitimate reason for delayed payment. Before considering installment payments,

however, the Economic Analysis Division of the Office of Policy and Resource Management (FTS 382-2764) and the Financial Management Division of the Office of Administration (FTS 382-5135) should be consulted in order to obtain a review of the financial condition of the responsible party and to determine any applicable interest charges.

Payment of cost recovery claims should be made payable to the U. S. Environmental Protection Agency and should be mailed to:

U.S. Environmental Protection Agency
Accounting Operations Office
P.O. Box 2971
Washington, D.C. 20013
Attn: Collection Officer for Superfund

The check or other form of payment should specify the name of the site at which the activity took place. The lead attorney is responsible for furnishing copies of judgments, decrees or agreements for payment of cost recovery claims as early as possible to Financial Reports and Analysis, Room 3617M, U.S. EPA, 401 M Street, Washington, D.C. 20460, for establishment of a proper account.

F. Procedure in Event of No Response to Demand Letter

If no response is received to the demand letter, a final determination must be made of whether the facts of the case justify the Agency taking further steps to pursue the cost recovery claim. A decision whether the case should be referred to DOJ should be made by the Region as well as staff at Headquarters at the time the demand letter is drafted. This decision will initially be made by the Regional Administrator, based on the recommendation of the Regional Superfund Office and the Regional Counsel.

Relevant factors to consider include:

(a) the strength of evidence connecting the potential defendant(s);

(b) the availablility and merit of any defense. Possible defenses under Section 107 of CERCLA are generally that the release and consequent response action was the result of:

(1) an act of God;

(2) an act of war; or

(3) an act or omission by an unrelated third party as to whom the owner/operator had no contractual relations and did not fail to exercise appropriate care against the foreseeable acts and omissions of that third party.

(c) the quality of release, remedy and expenditure documentation by the Agency, a state or third party;

(d) the financial ability of the potential defendant(s) to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement; and

(e) the statute of limitations.

In considering the ability of the potentially responsible party or parties to pay, the Regional Offices should make use of the Financial Assessment System, developed by the Economic Analysis Division of the Office of Policy and Resource Management and managed by NEIC, to assess the financial condition of most potentially responsible parties.

The determination of the Regional Administrator to initiate a cost recovery action shall be forwarded by a memorandum from the Regional Administrator to the Assistant Administrator for Enforcement for concurrence in the same manner as the referral of other matters for litigation. A decision not to initiate a cost recovery action must be reflected in a memorandum to OWPE. An

affirmative decision must be made by the Regional Administrator in each case in which CERCLA funds are expended, whether that decision be to proceed or not to proceed. This is necessary because of the Agency's accountability for management of the Fund.

After OEC concurs on pursuing the cost recovery action, OEC refers the case to the Department of Justice, together with the names of the appropriate Headquarters and Regional personnel who will be involved in the case. If the Department of Justice fails to concur, the originating Regional office is advised of such non-concurrence, together with the reasons therefor, and recommendations as to whether additional information should be provided for DOJ's reconsideration. Even though a Region may recommend against pursuing a cost recovery action, the Assistant Administrator for OSWER may decide on his own initiative that such an action is warranted. This recommendation would then be sent to OEC for consideration.

G. Maintenance and Coordination of Evidence in Event of Referral

There will inevitably be logistical difficulties in maintaining and coordinating the production of the mass of data, contracts, cost records, and other evidence generated in a response activity. It is very important to provide for an orderly method of expeditiously providing that information during the course of a cost recovery action for use during case development, discovery, and trial.

Each Agency, office, contractor or other person participating in a CERCLA response activity should maintain documents related to the activity for a period of not less than six (6) years after all response activities are finished (consult Appendix C for a list of these necessary documents).15/

The Agency's Financial Management Division will maintain and periodically update the cost expenditure tracking system for each site referred to above, so that an itemization of all costs attributable to a particular site can be quickly obtained. When a determination is made that a case should be referred to the Department of Justice for filing (or, if necessary, during the time that the demand letter is being prepared or the case is being considered for referral), a request can be made of the persons, firms or agencies involved in a response activity for copies of its records. At that time, a complete file of all records involved in the particular case can be compiled and delivered to DOJ, with copies of the complete file made available to appropriate Regional and Headquarters legal and technical personnel.

15/ The period of six years is necessary because of the possibility that the claim may not accrue upon the first expenditure. Additionally the litigation may be protracted; documents must be kept for the term of the litigation.

V. Note on Purposes and Use of This Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys and other employees of the U.S. Environmental Protection Agency. They are not intended to nor do they constitute rule-making by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action at variance with the policies or procedures contained in this memorandum, or which are not in compliance with internal office procedures that may be adopted pursuant to these materials.

We trust that this memorandum generally covers the subject of procedures to be involved in cost recovery actions under CERCLA, but if you have any questions or problems involving this subject matter, please call Russell B. Selman, Office of Legal and Enforcement Policy, at FTS 426-7503.

Appendix A

Costs Recoverable Under CERCLA

In order to identify records which must be developed and maintained for a cost recovery action, it is essential to know those costs which may be recovered from a responsible party. Various sections of CERCLA provide for recovery of certain elements of costs expended for site clean-up. We have attempted below to compile a list of those costs which are recoverable, and the sections of CERCLA which authorize recovery of those costs. This list is very general and not exclusive.

The listed costs are in general categories, using language directly from CERCLA, and a determination will necessarily have to be made in each case whether a particular expenditure is within the categories of recoverable costs. In this regard, EPA's position is that the intent of Congress was to authorize recovery of all costs directly related to clean-up of a site, and therefore the costs should be broadly construed to fall within these categories.

Cost	CERCLA Section
1. Investigations, monitoring, surveys, testing, and other information-gathering necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health, welfare or the environment.	§§104(b), 107(a)(1)(4)(A) (providing for recovery of costs for removal actions, which, as defined in §101(23) include actions taken under §104(b)).
2. Planning, legal, fiscal, economic engineering, architectural, and other studies or investigations	Same

necessary or appropriate to plan and direct response actions.

3.	Planning, legal, fiscal, economic, engineering, architectural and other services necessary to recover the cost of response actions.	same
4.	Planning, legal, fiscal, economic, engineering, architectural and other services necessary to enforce the provisions of the Act (CERCLA). (This could include costs incurred in prosecuting an immiment endangerment action under §106).	same
5.	All costs of (A) removal and (B) remedial action incurred by the U.S. Government or a State not inconsistent with the NCP. Actions for which such costs may be incurred are:	§107(a)(4)(A)

(A) Removal Actions (§101(23)):

(1) the clean-up or removal of released hazardous substances from the environment;

(2) such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment;

(3) such actions as may be necessary to monitor, assess or evaluate the release or threat of release;

(4) the disposal of removed material;

(5) such other actions as may be necessary to prevent, minimize or mitigate damage to public health, welfare or the environment which may otherwise result from a release;

(6) any monitoring to assure actions performed by other parties adquately protect public health, welfare and the environment, and meet EPA criteria;

(7) specific examples contained in §101(23) (without limitation):

a. security fencing or other measures to limit access;

b. provision of alternative water supplies;

c. temporary evacuation and housing of threatened individuals

d. action taken under §104(b) of CERCLA;

e. any emergency assistance provided under the Disaster Relief Act of 1974.

(B) Remedial Actions (§101(24)):

(1) actions consistent with permanent remedy taken instead of or in addition to removal actions, to prevent or minimize the release of hazardous substances into the environment so that they do not migrate to cause substantial danger to present or future public health, welfare or the environment.

(2) Specific examples contained in §101(24) (without limitation):

(a) storage;

(b) confinement

(c) perimeter protection using dikes, trenches or ditches;

(d) clay cover;

(e) neutralization;

(f) cleanup of released hazardous substances or contaminated materials;

(g) recycling or reuse;

(h) diversion;

(i) destruction;

(j) segregation of reactive wastes

(k) dredging or excavation;

(l) repair or replacement of leaking containers;

(m) collection of leachate and runoff;

(n) on-site treatment or incineration;

(o) provision of alternative water supplies;

(p) any monitoring reasonably required to assure that such actions protect public health, welfare and the environment;

(q) costs of permanent relocation of residents, businesses and community facilities (where relocation, alone or in combination with other factors, is more cost-effective than and environmentally preferably to transportation, storage, treatment or disposal off-site of the hazardous substances).

(3) Remedial actions do not include:

(a) off-site transportation of hazardous substances;

(b) off-site storage, treatment or disposal of hazardous substances;

unless it is determined that such actions are (A) more cost-effective than other remedial actions; (B) will create new capacity to manage (in compliance with Subtitle C of RCRA) hazardous substances in addition to those at the affected site; or (C) are necessary to protect public health, welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of the hazardous substances.

6.	Any other necessary costs of response incurred by any other person consistent with the NCP. "Response" actions include both "removal" and "remedial" actions (§101(25). (See list of removal and remedial actions above.)	§107(a)(4)(B)
7.	Damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury destruction or loss. (See note, below)	§107(a)(4)(C)

"Natural resources" include (§101(16)):

(a) land;

(b) fish;

(c) wildlife;

(d) biota;

(e) air;

(f) water;

(g) groundwater;

(h) drinking water supplies;

(i) other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any state or local government, or any foreign government (includes resources of the Fishery Conservation and Management Act of 1976).

NOTE: CERCLA §301(c) provides for the promulgation of regulations not later than two years after enactment of the Act for the assessment of damages for injury to destruction of or loss of natural resources resulting from a release of a hazardous substance. See footnote 3 in the Memorandum for further explanation on recovery of these damages.

Appendix B

(Model Demand Letter)

XYZ Corp.
Someplace, State 00000

Re: Name, location of site

Dear Sir or Madam:

On or about _____, 198_, there were releases and threatened releases into the environment of hazardous substances [and pollutants and contaminants] from the _____ facility located at or about _____. [In addition, there were releases and threatened releases of pollutants and contaminants that may present an imminent and substantial danger to the public health or welfare.]

[On or about _____, 19__, EPA gave [oral] notice to you _____ [which was confirmed] by letter of _____, 19__, advising you regarding the referenced facility and that you are a party who may be liable for money expended by the government to take corrective action at the facility. EPA offered you the opportunity to discuss with EPA your voluntarily taking action necessary to abate any releases or threats of releases of hazardous substances [and polluants and contaminants] from the facility. You did not undertake the necessary actions.]

In accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq., [and other authorities (insert where pre CERCLA or non CERCLA expenditures)] the [State of _____, pursuant to an agreement with and funding by the (insert if State lead)] United States Environmental Protection Agency (EPA undertook response action using funds provided for such actions. The action began on or about _____ and continued to on or about _____. EPA's response action entailed the (describe generally what was done).

The cost of the response action [performed] [caused to be performed by EPA at the facility] [was] [is currently] approximately $_____. (Insert the amount obligated by the Agency to be expended on the site, not the amount actually expended according to Agency records.) [The Agency anticipates expending additional funds in the future under authority of CERCLA for additional response activity which the Agency deems appropriate to be performed at the site.] Enclosed is a statement summarizing the expenditures to date.

Information available to EPA indicates among other things that you (choose one or more, of the bracketed clauses as appropriate:) [are/were at the time of the response action the owner/operator of the facility] [were the owner/operator of the facility at the time of disposal of hazardous substances at the facility] [did, by contract, agreement or otherwise, arrange for disposal or treatment, or arranged for transport for disposal or treatment of hazardous substances [and pollutants and contaminants]at the facility [accepted hazardous substances [and pollutants and contaminants] for transport to the facility which was selected by you]. Pursuant to the provisions of Section 107(a) of CERCLA [and other authorities (insert where pollutants or contaminants involved and where other law involved)], we believe that you are liable for the payment of all costs expended on the site to the Hazardous Substance Response Trust Fund established pursuant to Section 221 of CERCLA, which is administered by EPA.

We hereby request that you [or a group of parties potentially responsible for the site] make restitution by payment of the herein stated amount plus interest [together with any sums hereafter expended by the Agency on the site pursuant to authority of CERCLA]. [The names of other potentially responsible parties receiving this request for payment are enclosed with this letter to facilitate organization among the identified parties concerning payment.] If you [or an organized group of potentially responsible parties] desire to discuss your liability with EPA, please contact the person named below in writing not later than thirty (30) days after the date of this letter. We will otherwise assume that you have declined to reimburse the Fund for the site expenditures and will subsequently pursue civil litigation against you.

Sincerely,

Contact Person:

[Name]
[Title]
[Address]

cc:: Enforcement Counsel
Regional Counsel
State Agency

Appendix C

The following pages constitute a search guide that may be used by the Regional enforcement program in gathering documentation to support a cost recovery action. The search guide format is a chart with four columns, headed as follows: "Document", "Originator", "EPA Contact" and "Regional File Location".* All of the documents listed will probably not be available in all cases, nor will each one necessarily enhance the body of evidence in every case. It must be decided on a case-by-case basis exactly which pieces of documentation should be used as supporting evidence. The search guide was meant to be an exhaustive list of documents that should be considered. It is suggested that the persons conducting the file search for supporting documentation pull out each document on the list if it is available. It can be decided at a later time which of the documents are useful as evidence given the facts of the particular case.

Please note that the search guide covers only documents that would be useful in supporting the first three elements of proof discussed in this guidance: proof of the release, link between the party and the site and consistency with the NCP. Cost documentation will be the subject of another guidance document that is currently under development.

* The fourth column, "Regional File Location", has meaning only if the Region uses the filing system described in Appendix E.

I. Evidence of a Release or the Threat of a Release

Document	Originator	EPA Contact	Probable File Location*
• Notification Record pursuant to Sec. 103(a) of CERCLA	• Owner/Operator of facility • Gov't. officials responding to the problem (Local, State or Federal)	• National Response Center (NRC)	• NCR (see page 21, #1, bullet #1)
• Notification Record pursuant to Sec. 103(c) of CERCLA • Record of notification of EPA-HQ-Emergency Response Division, EPA Regional Administrator or other EPA official	• Owner/operator of facility • Appropriate Fed. officials	• EPA-Regions • EPA-HQ-Hazardous Site Control Division • EPA-Region, OSC • EPA-R.A. • EPA-HQ-Emergency Responsible Division	• Remedial Response: Discovery/Hazard Ranking File/Regions/ HQ • NRC • EPA-HQ-Emergency Response Division Removal Response File
• Compliance Investigation Report pursuant to Section 104(e) of CERCLA	• Federal/State Investigator	• EPA-Region, CERCLA Enf./Compliance Project Manager • State Enforcement/ Compliance Agency	• Remedial Response: Discovery/Hazard Ranking File
• Other Compliance Investigation or Inspection/Audit Reports pursuant to statutory authority (e.g., sec. 3013 of RCRA)	• Federal/State Investigator	• EPA-Region, Approp. Enf./Compliance Section • State Enforcement/ Compliance Agency	• Remedial Response: Discovery/Hazard Ranking File

*Unless otherwise noted, this assumes the documents are located in the Regional files and assumes the Regions are using the file structure outlined in Appendix E.

I. Evidence of a Release or the Threat of a Release (continued)

Document	Originator	EPA Contact	Probable File Location
• Notes from phone calls, correspondence, photographs, or other form of random or incidental observation	• Gov't. Officials (Local, State, Federal) • Public	• EPA-Region, Enf./ Compliance Project Manager • State Enf./ Compliance Agency • Municipal Government Offece (e.g., Public Health or Police Dept.)	• Remedial Response: Discovery/ Hazard Ranking File
• Signed witness statements (describing the conditions leading up to the release and the release)	• Owner/Operator Facility • Employees or Contractors assoc. w/ facility • Federal/State Investigators • Local Officials • Public	• EPA-Region, Waste Mgt. Division Proj. Manager • State Agency	• Remedial Response: Discovery/ Hazard Ranking File